UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CITY OF ALMATY, KAZAKHSTAN, ET AL.,

Plaintiffs,

v. 19-CV-2645 (JGK)

FELIX SATER, ET AL.,

Defendants. Jury Trial

----------x

New York, N.Y.
June 10, 2024
9:15 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

BOISE SCHILLER & FLEXNER LLP
Attorneys for Plaintiffs
BY: CRAIG A. WENNER
MATTHEW LANE SCHWARTZ
SOPHIE ROYTBLATT

RICHARD L. YELLEN & ASSOCIATES, LLP
Attorneys for Defendant MeM ENERGY PARTNERS LLC
BY: BRENDAN C. KOMBOL

LAW FIRM OF THOMAS C. SIMA
Attorneys for Defendant Felix Sater
BY: THOMAS CARL SIMA

JOHN H. SNYDER PLLC
Attorneys for Defendant Felix Sater
BY: JOHN HOOVER SNYDER

ALSO PRESENT: Zhadyra Nartay

(Case called)

THE DEPUTY CLERK: All parties please state who they are for the record.

MR. SCHWARTZ: Good morning, Judge. For the plaintiffs, Matthew Schwartz, John Zach, Craig Wenner, Sophie Roytblatt. And we are joined by our clients from BTA Bank, Zhadyra Nartay, and from the City of Almaty, Baurzhan Darmanbekov.

MR. SNYDER: Good morning, your Honor. John Snyder, for Sater, as well as Tom Sima, also for Mr. Sater. And Mr. Sater is sitting down at the table right now.

We are still waiting for Mr. Kombol. I don't know where he is, but I expect he will be here soon.

What can I say, your Honor?

THE COURT: Hope springs eternal.

Today was supposed to begin at 9:00. It is now 9:20. So we will wait a moment for Mr. Kombol.

MR. SNYDER: Your Honor?

THE COURT: Yes.

MR. SNYDER: While we are all waiting, I submitted a request for permission to bring my phone and computer. I am not sure I --

THE COURT: I had signed it.

MR. SNYDER: Oh, all right.

I will double check that. Thank you, your Honor.

THE COURT: It may not have gone on ECF.

MR. SNYDER: Is there a --

THE COURT: Mr. Fletcher is checking now.

MR. SNYDER: Okay. Thank you, your Honor.

THE COURT: I will be back in five minutes.

(Recess)

THE COURT: Please be seated.

Mr. Snyder went downstairs to retrieve his phone, which is fine. I think we have resolved the issue of the order. And we are still waiting for Mr. Kombol.

While we are waiting, let me confirm. Where is counsel for Mr. Ridloff? Where is the judgment for Mr. Ridloff?

MR. SCHWARTZ: As I said on Friday, I anticipate we will be seeking voluntary dismissal of Mr. Ridloff. I will put in a proposed -- as I said on Friday, we anticipate seeking a little bit later today dismissal of Mr. Ridloff. I will submit -- I will hand up a proposed order.

THE COURT: It was supposed to be before trial was beginning, not during trial.

MR. SCHWARTZ: I appreciate that. I think I carefully said on Friday before the jury was impaneled, but I will hand it up as soon as possible.

THE COURT: I really didn't note that your undertaking was before the jury was impaneled. I thought it was before

trial. If I have to parse your statements that way, that is unfortunate.

MR. SCHWARTZ: No. I understand that, Judge.

THE COURT: I was carefully following the e-mail and the ECF all weekend, or had them followed.

MR. SCHWARTZ: Understood.

THE COURT: While we are waiting, let me just confirm, because you went fairly quickly, so, for the plaintiffs, Matthew Schwartz, John Zach, Craig Wenner, Sabina Mariella.

MR. SCHWARTZ: Ms. --

THE COURT: I'm sorry.

MR. SCHWARTZ: Sophie. your Honor.

THE COURT: I have Sophie Roytblatt, not Sabina Mariella.

MR. SCHWARTZ: She will be participating in the trial, but I don't anticipate that she will be sitting at counsel table every day.

THE COURT: So I will mention her.

Lindsey Ruff?

MR. SCHWARTZ: Yes, same thing.

THE COURT: Sophie Roytblatt.

Also seated at counsel table are the paralegals, Sophia Cullinane?

MR. SCHWARTZ: Yes, she's --

THE COURT: But not at counsel table.

And Olivia Mackenzie.

Also seated the counsel table from BTA, Zhadyra Nartay and a representative from Almaty, Baurzhan Darmanbekov.

MR. SCHWARTZ: Correct.

THE COURT: I have the representative, Mr. Sater, John Snyder, Thomas Sima. Also seated at counsel table is Mr. Sater.

Okay. Mr. Snyder has returned.

MR. SNYDER: Thank you, your Honor, for letting me go get my phone. I appreciate that.

THE COURT: Sure. No problem.

I'm sorry that there was -- there must have been some confusion about getting you your order.

MR. SNYDER: A lot was going back and forth.

Your Honor, I don't know if this is helpful or not, but there is a motion *in limine* that I put in a letter that doesn't necessarily concern Mr. Kombol. If that would be something that can be profitably done right now, I submit it for your consideration.

THE COURT: Thank you. Mr. Fletcher attempted to get in touch with Mr. Kombol, who advises that he is en route and will be here in 25 minutes, which would make him an hour late for the first day of trial.

So you're right, Mr. Snyder. You had two motions *in limine*. One doesn't concern MeM, Mr. Kombol's client. Unless

there's disagreement, I will deal with that motion *in limine*.

MR. ZACH: Your Honor, we were going to submit a letter to the Court in response.

THE COURT: You can.

MR. ZACH: Okay. I'm happy to argue it now. But if it's beneficial to you, we can submit something by lunch.

THE COURT: Yes. With respect to the letter you can certainly submit a response, but I think Mr. Sater should be entitled to some response at the outset. Of course you can respond.

Mr. Snyder, the issue is the admissibility of Mr. Sater's prior conviction. As an overview -- and I will listen to both of you -- there are two issues, right? They get mixed up in the letter. The first issue is can the prior conviction about 15 years ago be used to impeach Mr. Sater if Mr. Sater decides to testify in his own defense? That would be a question of, can the prior felony conviction of about 15 years ago be used for purposes of impeachment.

So Rule 609 tells us under (a), 609(a)(1), with respect to attacking a witness's character for truthfulness by evidence of a criminal conviction (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a

defendant.

(b) Is the limit with respect to ten years.

This subdivision (b) applies if more than ten years have passed since the witness' conviction or release from confinement for it, whichever is later.

More than ten years, evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect and the proponent gives an adverse party reasonable written notice of the intent to use it.

So that's the rule if Mr. Sater testifies.

If Mr. Sater doesn't testify, then the question is, is the prior conviction admissible under Rule 404(b)?

The letter by Mr. Snyder keeps on talking about propensity. It would be surprising if the plaintiff said that the reason for the admissibility of the prior conviction is "propensity," which is not a permissible reason for using a prior conviction. But rather under the inclusive rule in the Second Circuit, it is admissible providing it is for a proper purpose, such as motive, intent, modus operandi, opportunity, knowledge, identity, absence of mistake, all of which the plaintiffs would have to set out with some specificity.

It is not sufficient for plaintiffs to simply list, motive, opportunity, intent, particularly with a conviction that's 15 years old.

Then of course it's limited by Rule 403.

So the simple answer to all of this at this point would be that the prior conviction shouldn't be referred to until it becomes clear whether Mr. Sater is testifying and, secondly, what the proffered reason is if the plaintiffs are relying on 404(b).

There is also the issue whether there should even be a ruling on that, as opposed to reserving judgment or reserving a ruling until after the plaintiffs have rested, after the defendants have determined what, if any, case they are putting on, and whether at that point the plaintiffs should be allowed to offer that evidence as part of a rebuttal.

So those are my observations on the letter.

But I'm happy to listen while we are waiting for Mr. Kombol.

Mr. Snyder, it's your letter.

MR. SNYDER: Sure. Thank you, your Honor.

I think your commentary will likely be very useful in navigating the issue, so I thank you very much.

Secondly, I did my very best to communicate the meet and confer, but if I missed one with Mr. Schwartz, I apologize for that.

The other point I want to make is of course your Honor is well aware that telling the jury about a conviction is a very heavy thing to have happen. I will have my work cut out

for me rehabilitating the witness. So I hope your Honor will give me at least a little bit of leeway to do that should it come up, but I guess we will address that as and when it comes.

THE COURT: When you talk about rehabilitation, that assumes that you are going to call Mr. Sater or Mr. Sater will be called as a witness. I don't know if Mr. Sater will be called as a witness in either case.

Mr. Zach?

MR. ZACH: I was going to say, your Honor, I do think it's likely that he is going to be called. We will probably call him in our case in chief. In our letter we intend to set forth the core, sort of our theories specifically under 404(b), which, as your Honor sort of anticipated, we would link to knowledge, intent, and modus operandi.

MR. SNYDER: Your Honor, I am very happy to meet and confer with them on this in light of the commentary you very helpfully provided. So there we are.

THE COURT: It's still not so clear to me -- I am sure the plaintiffs will make it clear in their letter -- assuming that the plaintiffs are calling Mr. Sater as part of that case, whether the purpose of introducing the conviction would be for purposes of impeachment or under Rule 404(b), and if 404(b), why.

MR. ZACH: Sure, your Honor.

I mean, just to give a preview, I think I will start

with 404(b). You know, Mr. Sater has given a number of depositions in this case. To explain his prior conviction, his prior conviction was a racketeering conviction, and it included predicate acts of money laundering and securities fraud. And in the money laundering there were sort of offshore bank accounts that were used and the actual owners of assets were hidden behind other people.

In his deposition Mr. Sater repeatedly denies knowing that Ilyas Khrapunov who was -- taking us back to our prior trial, your Honor -- the individual that was setting up shell companies and using offshore bank accounts to hide the money, he denies knowing that what he was doing was wrong or that the use of nominees was wrong or in any way concerning, essentially saying, well, I looked at these things, that they were using the shell companies, that they were using, you know, what Mr. Sater refers to as shills as fronts for that, that that didn't really raise any concern for me.

So what we would argue is knowing, having had his experience and conviction in money laundering, having been convicted for using some of those same tools, he should very well know and did know that that sort of those were -- the tools and methods were in fact likely to be indicia of money laundering.

THE COURT: So you are not relying on 609?

MR. ZACH: Well, there's overlap between the two. We

are going to argue in the alternative, but I think in some ways the cleaner argument is 404(b) if we are calling him in our case. We could also -- the impeachment, 609 doesn't distinguish between if you're calling him in your case or if it is a defendant.

I think it's equally relevant there because what the courts look at there is how the prior conviction relates to truthfulness, how much did it include lies and sort of deceptive acts. And in Mr. Sater's case, his conviction, you know, was for securities fraud and for money laundering, and there's a whole series of sort of deceptive acts that were part of that. So I think it's equally relevant for that.

I think the simpler thing to articulate is at this point, when the court is trying to consider it as it's coming in, the purpose is under 404B. Just to add one, to sort of tee it up, because we have the time --

THE COURT: My one caution is there is some case law that says before you admit a prior conviction or prior bad act under 404(b), the Court should be reasonably confident of the admissibility. In some cases there is a preference to defer until a rebuttal case, whereas impeachment is something that is dealt with at the time of the testimony.

MR. SNYDER: I would only point out that Mr. Sater is only going to be arguing statute of limitations and release. To the extent the prior conviction is relevant to anything, it

is probably relevant to did he engage in these transactions, which that's not our point. Our point is statute of limitations and release.

THE COURT: On the other hand, it's part of the plaintiffs' case to prove the defendant's knowledge, right?

Just because you argue statute of limitations and release doesn't foreclose the necessity of the plaintiff proving knowledge. I will listen to the evidence. I will listen to the opening statements.

I'll listen. I am anxious to hear whether the defendant, Mr. Sater, would say, of course I knew or we don't contest that he knew. The case is about reserving the issue until it is clear that the prior conviction is relevant to that issue.

To talk about the ability of the party to take the issue out of the case, I don't know whether the defendant will take issues of his knowledge intent out of the case. I mean, I fully appreciate that the arguments you intend to stress are statute of limitations and release. But that is a long way away from saying that other issues in the case are stipulated or not at issue.

So I pass that along. We will see how the case develops. I look forward to the plaintiffs' prompt letter on this issue, and you will have an opportunity to respond.

MR. SNYDER: Thank you very much, your Honor.

Advice taken.

MR. SCHWARTZ: Judge, while we are here, the one other, I think, unresolved complication on the docket, which is not controversial, related to the live remote testimony of some witnesses. Of the three witnesses that we --

THE COURT: I decided that. I endorsed the letter.

MR. SCHWARTZ: I think I may have missed that.

THE COURT: I hope it went out on ECF.

MR. WENNER: It did. It was my mistake this morning, your Honor. You did.

MR. SCHWARTZ: Let me provide by way of update that of the three witnesses, two of them are here in the United States and will be appearing live. It will only be Ms. Junussova, as last time, who will appear by live remote.

On a logistical point, what we did last time, that worked very well I think, was Mr. Fletcher brought in a large screen so the jury could see the witness on the large screen and the exhibits on their personal screens just as if she was testifying live. If it's possible to arrange for those logistics again, that would be appreciated.

THE COURT: Of course.

MR. SCHWARTZ: Thank you.

THE COURT: Just talk to Mr. Fletcher about getting the equipment brought in.

MR. SCHWARTZ: Of course.

MR. SNYDER: Judge as long as there's 20 lawyers here, I wonder if I could get the Wi-Fi password for this. Is there a Wi-Fi access?

THE COURT: I am sure I initialed the order, so the plaintiffs can provide it.

MR. SCHWARTZ: The district executive provides a unique login for every person.

MR. SNYDER: Okay. So we can try.

THE COURT: Could I ask when the plaintiffs would otherwise intend to call Mr. Sater as a witness?

MR. ZACH: It would not be this week, your Honor if that's --

THE COURT: Well, when can you have your response to the defendants' motion with respect to the prior conviction?

MR. ZACH: I think by lunch.

THE COURT: By lunch?

MR. ZACH: Yeah, I have been working on it. Lucky I've got 20 minutes to edit it.

THE COURT: That's fine. You can give it to me by 4:30 today if that's reasonable.

MR. ZACH: That's reasonable, your Honor.

THE COURT: And then Mr. Sater's counsel can give me a response by --

MR. SNYDER: When would you like it, your Honor? Can I have 24 hours after.

THE COURT: Sure.

MR. SNYDER: If you can give me -- one day is fine.

THE COURT: So by 7:00 tomorrow, p.m. 7:00 p.m. tomorrow.

MR. SNYDER: Right. 7:00 a.m. in the night is not good, but, yes, 7:00 p.m., Judge.

THE COURT: You view 7 a.m. as the night?

MR. SNYDER: Well, I worked in a big firm, and they had all-nighters back then, so that is what I was referring to.

THE COURT: It's not healthy.

MR. SNYDER: I try not to do those anymore.

Judge, if they call Mr. Sater for cross in their case, am I required to do his testimony then or can I reserve the direct for my case?

THE COURT: You can do whatever you want to do on cross, and you can certainly reserve matters to be dealt with in your case.

MR. SNYDER: Thank you, Judge.

Your Honor, I should say if it makes this morning 1 percent easier for Mr. Kombol, I will be happy to take this hour out of our time.

THE COURT: No. That's very generous of you, but the clock is only running when the parties are offering testimony. So the clock isn't running now. But you've given me an idea about how to deal with the situation in the future.

MR. SNYDER: I would rather that than you be mad at Mr. Kombol. He is a very good lawyer.

THE COURT: I don't get mad. My patience, as I like to say, is inexhaustible.

MR. SNYDER: I appreciate that, your Honor. Thank you.

THE COURT: But one way to deal with lateness, because after we have impaneled the jury it is really disrespectful to the jury when I tell them to be here on time, so there may come a time when I call the jury to the box and we wait for a lawyer or a client who is not here. And the jury will appreciate why it is that they're waiting and the clock isn't running. Running the clock is certainly another alternative.

MR. SNYDER: Your Honor, would it be okay if we took a break.

THE COURT: Okay. We will take a break and Mr. Fletcher will tell me when Mr. Kombol has arrived.

It is now 10:08.

(Recess)

THE COURT: Please be seated.

It is now 20 after 10:00, 22 after 10.

Mr. Kombol, you have arrived.

MR. KOMBOL: My apologies, your Honor. I had this scheduled for 10 a.m. on my calendar. That was not correct.

THE COURT: Could you use the mic.

MR. KOMBOL: My apologies, your Honor.

I am so sorry. In my calendar, I had this scheduled for 10 a.m. Clearly that was improper. I was even late for that. There is no excuse. I promise it will not happen again. I only ask the Court's forgiveness. It was not intentional.

THE COURT: Okay.

You would be late by 22 minutes even if this was scheduled for 10:00.

MR. KOMBOL: Acknowledged, your Honor. I understand.

THE COURT: Okay.

Is your client coming today?

MR. KOMBOL: My client is not coming today. He will be here to provide testimony. In fact, I recently learned that a subpoena was offered on my client.

We don't oppose the subpoena. However, the problem is it was scheduled for his testimony to be here during the two high holy holidays of Shavuot, which conflicts with the days that he was requested to be here. We don't object to him being here. Obviously he can't be here for those two days. We will work with his schedule as the majority of the testimony does not involve him.

THE COURT: Fine. I will introduce him to the jury. There are other participants, paralegals and the like, who are not here that I will mention to the jury.

So it is not a problem that he is not here. I just

want to mention his name for the jury.

With respect to the time limit, I accept your statement. If this occurs during trial, I may bring the jury out and then the jury can assess who it is who is keeping them here. But I appreciate your statement.

MR. KOMBOL: And, your Honor, any reservations, I apologize. There was an error. I hate to burden the Court.

THE COURT: No.

Your prior statement was perfect. I never ask lawyers to "apologize." All I ask is that lawyers acknowledge that it will not happen again.

MR. KOMBOL: It will not. Unless something --

MR. SNYDER: It will not happen.

MR. KOMBOL: It will not happen.

THE COURT: So in your absence we talked about impeachment or the admissibility of Mr. Sater's prior conviction, and the defense will give me a letter in response to Mr. Snyder's letter on that issue. Mr. Snyder will have an opportunity to reply by tomorrow.

We didn't discuss the other issue, which is Mr. Snyder's request on behalf of Mr. Sater to adjourn the trial from today based on the allegation that the defendants did not file answers to the second amended complaint. This was a letter filed early in the morning today, very early in the morning today.

Anything else you would like to tell me in connection with that letter, Mr. Snyder?

MR. SNYDER: Nothing in particular other than, your Honor, I set it all out for you. I am not sure I have ever seen a situation like this before. I found out about it Friday after court. So under the circumstances I am doing the best I can do.

THE COURT: Okay. So the request for the adjournment is based upon the fact that there was a second amended complaint and that the defendants didn't answer the second amended complaint. Right?

MR. SNYDER: That is part of it. But I would also like to allow Mr. Kombol to argue the point, because I think he's probably more versed in it than I am, although we're both versed in it.

THE COURT: Mr. Kombol.

MR. SNYDER: Do you want to switch?

THE COURT: No. Mr. Kombol didn't file a letter on this issue, but I will listen to him.

MR. KOMBOL: Your Honor, what I did do last night was I filed an answer to the second amended complaint with various affirmative defenses.

THE COURT: That's about two years after the second amended complaint was filed.

MR. KOMBOL: Absolutely correct, your Honor. Forgive

me. I am about three weeks into this trial. I am replacement counsel to my prior counsel, who Jason -- I forgot his last name.

THE COURT: Cyrulnik.

MR. KOMBOL: He was actually a former colleague of Mr. Schwartz's and all other counsel at Boies. I don't now how an answer was not filed. Honestly, this is unprecedented. I didn't even anticipate it until I started researching the issue.

If your Honor would like, I can even show you e-mails between me and Jason where I asked, for example, I don't see how the summary judgment was determined. It is a locked file. I don't have access to it. Whereas the answer, even as late as Thursday evening, I have e-mails asking him where is the answer? I'm still missing some in my file.

After he literally refused or failed to respond to that, I researched the docket again and again and again. I interacted with my cocounsel on the defense side, or I guess counsel for the other defendants who are seated with me. They confirmed that no answer had been filed. I am procedurally unaware of any situation -- I apologize I didn't want to cut you off. What were you saying, your Honor?

THE COURT: Did you do a comparison of the second amended complaint to the first amended complaint and see what changes were made in the second amended complaint?

MR. KOMBOL: Here's the unique thing, your Honor. With respect to my client, apparently no answer was ever filed somehow. I don't understand --

THE COURT: No.

MR. KOMBOL: Forgive me.

What were you saying, your Honor?

THE COURT: My question is did you check to see what the differences were in the second amended complaint from the first amended complaint?

MR. KOMBOL: I didn't --

THE COURT: Apparently Mr. Snyder did.

MR. SNYDER: He is new to the case. We have been around a bit longer. We have, and it's substantive.

THE COURT: It's what?

MR. SNYDER: It is substantive changes. It is not minor.

THE COURT: Did the substantive changes go to the issue of equitable estoppel as it applied to MeM?

MR. KOMBOL: Your Honor, that is literally what the substantive changes were directed at. But more importantly --

THE COURT: In order to overcome the dismissal of unjust enrichment claim against MeM?

MR. KOMBOL: Your Honor --

THE COURT: So they were more specific allegations.

MR. KOMBOL: I did not do a redline comparison to the

prior order that directed the second amended complaint, that did specifically state please expand on those concerns.

THE COURT: Okay.

MR. KOMBOL: What is unique here, and I would ask the Court to observe, somehow apparently there was even a prior summary judgment motion that was entertained by this court that was prosecuted by my prior counsel that was directed at the prior pleading. And even that summary judgment motion was promoted in the absence of an answer even to that first pleading.

I don't understand -- and I will just give you, you know, kind of a more personal perspective -- how we could be here today without an answer having been on file, literally to the point that I not only conferenced with my colleagues, but my father's is an attorney as well. And last night at 10:30, 11 p.m., before I filed the amended, answer I called him, and I said I'm kind of on a road uncharted.

I don't understand how we can be here. I asked for his advice, because this is not a situation that is I have ever encountered. But as counsel for a party who is about to be engaged in a trial, I think joinder is a critical issue.

There is a protocol to address this. It appears that plaintiffs simply did not move for default, which would have been the customary course. I don't know how or why we are here today. Again, I was three weeks ago retained in this matter,

but here we are.

THE COURT: I'm sorry. Do you want a default entered now because for two years you didn't file an answer?

MR. KOMBOL: I have researched that as well, your Honor. I don't think that's a procedural option, because prior to the entry of any default there has to be, pursuant to the local rules of both the Eastern and Southern Districts a clerk's certificate of default, and only then is a default entertained.

And when, as here, a late-filed answer, as I understand from my research under the rules of this district, including the local rules, so long as you file an answer before a clerk's certificate of default and a related application for default is entertained, that answer is deemed essentially a motion in support of a request to vacate a default.

Any late-filed answer is in that context essentially interpreted and considered in that lens. And when, as here, there is no existing clerk's certificate of default, there is a procedural impediment to basically issuing a default.

I may be wrong on this. Again, this is uncharted territory. But I cannot imagine how I can proceed to trial without an answer on file.

So good, bad, or ugly -- and this is, again I ask the Court to appreciate, no fault of my own. I'm brand-new counsel three weeks in.

After apprising myself and appreciating the issue of, I guess, having failed to receive any further clarity from prior counsel on this despite repeated requests, it followed a review of the docket, I find myself here and I have to protect myself and my client. And I ask the Court to accept the answer. And obviously absent the answer, if the Court says a default is warranted, those are the waters we will navigate next. But here we are.

THE COURT: Okay. Thank you.

Plaintiffs?

MR. SCHWARTZ: Just one observation before I get to the substance of the argument.

We had last night answers filed on behalf of MeM energy and Felix Sater. For reasons I don't quite understand, even in this particular procedural posture, no answer was filed for Global Habitat Solutions or Bayrock, which are represented by Mr. Snyder and Mr. Sima. So I am not sure what they contend is the impact of that.

But the reality is none of this matters because we are here on the eve of trial, and the Court has entered the joint pretrial order. Under Rule 16, the joint pretrial order "controls the cause of the action unless the court modifies it." And courts have held over and over again that, regardless of the pleadings, what is in the pretrial order controls.

So, for example, in *Rockwell v. United States* 2007,

it's 549 U.S. 457, the Supreme Court explained that the final pretrial order "superseded all prior pleadings." The Supreme Court has explained that, for example, when a party fails to plead in any pleading a claim or defense, but that claim or defense is contained in the final pretrial order, that is what controls and that's what we go to trial on. I cite, for example, in addition to some of the cases cited in the *Rockwell* decision, *Curtis v. Lother*, 415 U.S., 189, at note 1, a Supreme Court case from 1974.

There is no shortage of cases that are all to the same effect, that in this procedural posture, once we have a joint pretrial order that spells out as the parties have stipulated or set forth their claims and defenses and the Court has ordered, that's what controls the trial of the action. Nothing else is required to quote-unquote join issue.

MR. KOMBOL: If I can respond to that?

THE COURT: No. Hold on.

Anything further, Mr. Schwartz?

MR. SCHWARTZ: No, your Honor. Only to explain that the reason we didn't seek defaults is, number one, these parties were actively litigating; and, number two, we did seek a default against defendant Ferrari, and Judge Nathan declined to enter the default pending adjudication of the claims against these defendants.

So it didn't seem like it would have been fruitful to

pursue default. These parties have been litigating actively for years. We know what their claims and defenses are.

MeM moved to dismiss, they moved for summary judgment on theories of statute of limitations that are well explained in the papers, and, as the Court held on Friday, well explained in the final pretrial order and endorsed by the Court. Again, that's what controls.

MR. KOMBOL: Your Honor, if I may?

THE COURT: Yes.

MR. KOMBOL: I would be shocked, not having seen whatever case law Mr. Schwartz just briefly broadly referred to, I would be shocked to find that any of those cases deal with a situation where, as here, we are at trial without joinder. I don't think there is a procedural mechanism to support even such a thesis.

As he stated and as he referenced in the case law, if it relates to prior pleadings, except that is in prior pleadings, the pretrial order controls.

There are no pleadings. There have been no pleadings on file. Again, I don't understand how we've gotten here. But there is no mechanism where you proceed to trial at a federal level of this magnitude without joinder of issue.

THE COURT: Okay.

MR. KOMBOL: It's frustrating. It's literally confounding. Here we are.

His vehicle was to move for default. He probably should have. But now there is an answer on file, and we ask the Court to accept it, again, all within the context that they recognize, that this is an uncharted arena. I have never anticipated or seen this in my entire experience or in my entire career.

THE COURT: Okay.

The motion for an adjournment is denied.

First of all, the trial is controlled by the terms of the joint pretrial order, which sets out the claims and defenses of the parties.

To the extent that the defendants now claim that they didn't file an answer earlier in the case to the second amended complaint, they have waived that argument or forfeited that argument by having failed to make it for the two years after the second amended complaint was filed, which was filed in order for the plaintiff to respond to MeM's argument that there were insufficient allegations of equitable estoppel.

Up until literally the night before trial was to begin, MeM asserted for the first time that the trial should not go forward because it hadn't filed an answer for --

MR. KOMBOL: Your Honor, excuse me.

THE COURT: Hold on.

MR. KOMBOL: I never --

THE COURT: No. Hold on. When I am talking, you just

don't interrupt. What is there about that that you don't understand?

MR. KOMBOL: Your Honor, you have suggested that I argued or requested the trial not go forward. That was not our request. We requested that the answer be accepted. We were happy to move forward with the trial. We never requested, suggested, or in any way applied for a suspension of the trial. My colleague did. That was not my client.

THE COURT: Thank you. It was Mr. Sater who moved to adjourn the trial. You are absolutely right. So I stand corrected on that issue.

It doesn't change the fact that none of remaining defendants, prior to the letter sent by the Sater defendants on the morning of trial, suggested that there was a procedural defect that had to be remedied before trial could go forward.

MeM is right. MeM didn't even ask for that last night or early this morning and just joined the argument this morning.

No? That's not right?

MR. KOMBOL: Incorrect, your Honor. I did not join argument or move for an adjournment. I merely asked the Court to accept our answer to allow joinder.

This is a procedural impasse that I believe cannot be overcome by even accepting or somehow aggregating what amounts to an answer to a pretrial order and other pretrial actions.

Joinder through a formal entry is strictly controlled by the federal rules, and the rules of this district literally determine and set forth how this must be done in the context of a situation where an answer is offered late, even on the eve of trial, prior to the request for a default.

THE COURT: Okay.

MR. KOMBOL: If your Honor is inclined, if your Honor is inclined to hodgepodge together what amounts to an answer from our prior action in the other trial without a formal answer of joinder, if that's where this is going, I ask the Court only to specifically expressly rule to that extent, because I believe, and I have reviewed this extensively, that it will result in essentially a mistrial that proceeds without authority because joinder has not been achieved.

THE COURT: I --

MR. KOMBOL: And later joinder --

(Continued on next page)

THE COURT: Stop. Please. By joinder, you mean the filing of a defense.

MR. KOMBOL: Incorrect, your Honor. Under the federal rules, an answer is a specific instrument and specific standards that must be filed in a specific manner, not a defense that was argued in other pretrial filings or --

THE COURT: Hold on. Hold on. The argument is because there was no answer to the second amended complaint, the trial shouldn't go forward.

MR. KOMBOL: Incorrect, your Honor. What I'm saying is, there are two options. We have two roads --

THE COURT: Okay.

MR. KOMBOL: -- quoting Robert Frost, that we can follow.

THE COURT: Hold on.

Unlike the Sater defendants, the only thing that you've done is to file an answer to the second amended complaint. You haven't given me a letter or a motion with respect to adjournment or the inability to go forward. You've simply filed a first amended answer.

MR. KOMBOL: In answer to the second amended complaint, not a first amended answer. In fact, this is the first answer on file in this matter in any context by my client.

THE COURT: Okay. Thank you.

So as I was saying, the motion to adjourn the trial which was made by the Sater defendants and the motion -- well, it's not even a motion.

MR. KOMBOL: Correct, your Honor.

THE COURT: Hold on.

MR. KOMBOL: I apologize.

THE COURT: Hold on. What is it that you don't understand about interrupting the Court? What is it that you don't understand? Please sit down.

MeM has filed a first answer to the second amended complaint. That answer is stricken as too late. The opportunity to file such a document has long since passed. The trial is controlled by the joint pretrial order which was signed by representatives of all of the parties and signed by the Court. To the extent that there are any arguments that the failure earlier in the case, or now, to have filed an answer, any such argument is waived or forfeited.

The trial will be controlled by the joint pretrial order. All of the parties had an ample opportunity to contribute to the joint pretrial order, to object to anything in the joint pretrial order, and there were no objections to the joint pretrial order, and I have signed the joint pretrial order.

So to the extent that there is any motion to adjourn the trial, it is denied. To the extent that MeM is attempting

to argue that there should now be a mistrial, that motion is also denied. All right.

MR. KOMBOL: Thank you, your Honor.

In light of your Honor's ruling, MeM declines to further participate in this trial. We rest on our pleading, and we will deal with everything further through an appeal of your Honor's current order in the absence of the ability or acceptance of an answer and joinder in this matter, and we disagree, and we will strongly address on appeal these rulings.

We accept your Honor's rulings today. However, in the absence of joinder, an answer, defenses or anything further, and if in fact the Court is relying upon essentially a joint pretrial order in lieu of answer and joinder, we accept your Honor's analysis, we respectfully disagree, and we will reserve all pending and further matters from appeal. However, absent an answer, I am unable as counsel for my client to proceed to trial, and I rest on that basis.

THE COURT: I'm sorry, but your predecessor signed the joint pretrial order.

MR. KOMBOL: Your Honor, I disagree that that has any impact on whether joinder is achieved in this matter. Mr. Schwartz had an obligation to proceed to default. He did not. If this is your Honor's order, I will appeal this promptly, we will address this, and we reserve, but I decline to proceed to trial absent joinder in the answer on file which

I have offered. And as the Court is aware, you xxx trial answers in pleadings that may be amended. If the Court is unwilling to accept our answer and accept joinder, then we will proceed as I just addressed, and we decline to further participate in this proceeding.

THE COURT: All right. Mr. Snyder.

MR. SNYDER: Just one very brief point of clarification or just pointing something out, I should say.

On, for example, page 2 of the pretrial order, it cites the plaintiffs referred to their second amended complaint, ECF 399 right in the middle of the page, page 2. But then you go on to the, for example, the Ridloff -- let me see if I can get to it. Give me one second. Well, I will -- I can't find it in the moment, but I will just tell you my point.

My point is, when referring to the complaint, plaintiffs refer to the second amended complaint. When referring to the answer, the defendants are referring to the answer to the first amended complaint. And whatever importance that has, I just wanted to make sure that fact was clear; that there were sort of two ships passing in the night. We have the second amended complaint answered by the first amended -- the answer to the first. So that's my point, and I'll sit down.

THE COURT: Plaintiff?

MR. SCHWARTZ: Thank you. With respect to the last point, I don't think it matters what is cited in the final

pretrial order. It recites the claims and defenses to be tried, and, again, all the parties signed it and your Honor signed it. That's what controls.

With respect to Mr. Kombol's assertion that he doesn't intend to participate in this trial, I suppose it is his right to sit here and not give an opening and not examine any witness, but unless his client is consenting to entry of judgment on all claims against it and the amounts we are seeking, this is a trial defendant, and he should be required to be here, and his client is under subpoena.

MR. KOMBOL: Your Honor, with respect to that, again, I am unable and unwilling to proceed absent joinder in this matter.

Mr. Schwartz had an opportunity to move for default. He did not. Procedurally, I have researched the rules. I am confident in how I rest and how I stand.

If he requires my client as a witness after the Jewish holidays have passed, he is free and willing to call him, and I will be here, and I will stand with him as he testifies. But I will not participate in the trial without joinder. I cannot as counsel. And if Mr. Schwartz wants to apply for default or seek whatever procedure he feels he is able to pursue in support of default, even orally requesting it right now before your Honor, I will address all of those matters through appeal.

But I will not participate and proceed to trial and

give the color and credibility to a proceeding without joinder, and I will not budge on that. And whatever Mr. Schwartz wants to pursue, whatever relief he believes he's entitled to, he is entitled to pursue, and I will address all of that on appeal. If he is subpoenaing my client, which I will acknowledge he has, we will present him for whatever worth it may be in a matter in which I literally decline to proceed without joinder, we will present him at a time that the high holy holidays allow, which is probably early next week, or I believe possibly Friday of this week. But beyond, that I cannot ethically or as a petitioner proceed in a hearing in a proceeding in which there is no joinder.

And I firmly disagree that a joinder can be somehow cobbled together through a pretrial order and prior motion practice. Joinder is a specific act that was not achieved in this matter. I don't know why. I don't know how. Yet, here we are, and I stand firm.

MR. SNYDER: Your Honor, on behalf of the Sater parties, I am not authorized to take the position that my colleague did, certainly not without a real discussion. So I am not inviting you to default me. If he wants you to, that is fine, but I am not making that request.

THE COURT: Thank you, Mr. Snyder.

Mr. Schwartz.

MR. SCHWARTZ: It is somewhat unorthodox, but I have a

question. Mr. Kombol keeps saying he researched the rules and they inflexibly require joinder. I'm curious which rules he is pointing to and which he has researched because the only reference to joinder in the federal rules that I'm aware of is in Rule 15 and thereabouts, and that's joinder in a totally different context.

So I'm unclear even the basis for this argument. But to the extent, again, that the point is the claims and defenses have to be identified, that's been done pursuant to Rule 16 in the final pretrial order.

MR. KOMBOL: Your Honor, if Mr. Schwartz would like me to elaborate, I can refer the Court to the matter Seaford Avenue Corp. v. --

THE COURT: He asked for a rule. He asked for a rule. A rule has a number.

MR. KOMBOL: I will expound on that, your Honor, briefly. One moment.

Pursuant to Local Rule 55.2, which addresses the manner in which a default may be secured pretrial, the procedures and protocols necessary to secure such relief is expressly and specifically set out, and this has been addressed in --

THE COURT: No. No. You're addressing the wrong issue. You're addressing the requirements under the local rules to obtain a default.

MR. KOMBOL: Correct, your Honor.

THE COURT: The question was where are you coming up with your notions that the failure to file an answer in and of itself is somehow a jurisdictional defect, and that the other side must move for a default?

MR. KOMBOL: Your Honor --

THE COURT: So the question was, what rule?

MR. KOMBOL: Rule 7, your Honor.

THE COURT: Rule 7.

MR. KOMBOL: Also Rule 10.

THE COURT: Whatever the unspecific allegations are, the joint pretrial order was signed and consented to by the parties and governs the trial. The only issue in my mind at this point is whether at this point, given the position of MeM, judgment should be entered against MeM which MeM invites. But it's not so clear to me what the judgment would be against MeM, which would require a trial or an inquest.

MR. KOMBOL: An inquest, your Honor.

THE COURT: So the plaintiffs say if MeM is a party at the moment pursuant to the joint pretrial order, if MeM decides to stay silent during the trial and present no defense, so be it. The jury will determine whether there is liability against MeM and what the damages are against MeM. But MeM concedes that there is liability. The only issue is what's the amount of damages.

MR. KOMBOL: Your Honor, I disagree. MeM does not concede any liability. What we do is decline to proceed in the absence of joinder.

THE COURT: MeM says they are plainly not going to defend, they are not going to proceed. So the question is whether I should simply enter the default against MeM now or proceed to trial with MeM declining to proceed to trial.

MR. KOMBOL: Your Honor, I'd like to specify. We --

THE COURT: I think I've heard you out.

MR. KOMBOL: We are happy to proceed to trial if our answer is accepted and joinder is accepted, but absent joinder, I cannot proceed to trial.

THE COURT: I've heard you. I've heard you, all right?

Plaintiffs, what is the amount that's being sought against MeM?

MR. SCHWARTZ: One moment.

THE COURT: I will take a ten minute break.

(Recess)

(Continued on next page)

THE COURT: Plaintiffs, do you have any observations?

Let me begin before asking. It is plain to me that the plaintiffs are entitled to a default against MeM. MeM has announced that it will not proceed to defend the claims against it in the trial that was scheduled to begin today, and that failure to defend with a plain basis for a default judgment against MeM under Rule 55(b)(2), Default Judgment by the Court.

Similarly, under the Second Circuit cases, *New York v. Mickalis Pawn Shop LLC*, 645 F.3d 114 (2d Cir. 2011), where the Court said among other things, we cannot permit the defendant to short circuit the normal litigation process by withdrawing, inducing a default judgment to be entered against them, and then obtaining de facto interlocutory review over otherwise nonappealable decisions.

Similarly in *Brock v. Unique Racquetball and Health Clubs Inc.* 786 F.2d 61 (2d Cir. 1986), where the Court of Appeals said this is the unusual case where a default is entered because counsel fails to appear during the course of a trial. In this context the trial judge responsible for the orderly and expeditious conduct of litigation must have broad latitude to impose sanctions for default for nonattendance occurring after a trial has begun.

So the next issues are --

MR. KOMBOL: Your Honor, briefly, if I could respond to that.

THE COURT: No.

MR. KOMBOL: My apologies. If you will allow me an opportunity after you are done, I would appreciate it.

THE COURT: I'm sorry?

MR. KOMBOL: My apologies for jumping in.

THE COURT: Go ahead.

MR. KOMBOL: If you would allow me to respond after you finish, I would appreciate that.

THE COURT: What should the next step be?

I would listen to the plaintiffs with respect to this, because it is the plaintiffs' case against the defendants. There is case law for continuing a trial that's begun so that there can be a determination of damages. In this case the trial hasn't begun and the amount of damages could be determined at an inquest, including with the benefit of the trial record. That's why I want to listen to the plaintiffs. It would seem to me that the -- well, what is the plaintiffs position?

MR. SCHWARTZ: So, if it is the Court's intention to enter default judgment against MeM Energy, the question is how to determine the appropriate measure of damages. I would suggest to the Court that the evidence that we will put on at trial, even if trial is only against Mr. Sater and his entities, will either necessarily or without doing violence to the presentation of evidence or extending things, include all

of the evidence necessary to make findings with respect to the damages against MeM Energy.

For example, much of the, or some of the money that was received by Mr. Sater or his entities through this money laundering scheme was routed through MeM Energy accounts. So we have to tell that story anyway.

So I would suggest if the question is simply how to determine the appropriate measure of damages, we will put on that proof, and the question of damages as to MeM can be a question for the Court to resolve based on that record rather than a jury question. Just this last time around we had equitable claims and legal claims.

THE COURT: So I wouldn't identify MeM as a defendant for the trial or introduce it as a defendant? This would be a case of the plaintiffs against Mr. Sater and related entities, and any determination of damages would await after the trial, and I would give sufficient notice, again, to MeM with respect to the issue of damages after trial?

MR. SCHWARTZ: That certainly is a way that you could proceed. I will say, without having an opportunity to research the question, I have a little bit of hesitation about entry of default judgment to the extent that it could be determined a judgment other than on the merits. Because that would be subject to subsequent attack by MeM or its principal.

I think a different way you could go about this

potentially, seeing as how the defendant doesn't intend to contest any issues at trial, even though notwithstanding the absence of an answer Mr. Kombol has not identified any factual or legal issue he would raise at trial that he is impaired from raising, but if he intends not to participate at trial, not to put on a defense, if there's no answer on the file and he doesn't want to be bound by the pretrial order, then the natural consequences, having failed to timely answer and not being bound by the pretrial order are that all of the allegations of the complaint are deemed admitted, and no affirmative answers have been interposed. In that case your Honor could also grant summary judgment on liability to the plaintiff and again address damages in the way that you have just suggested.

THE COURT: I would get a response from the defendant with respect to an application for --

You can sit down, sir.

-- with respect to an application for summary judgment. So do the plaintiffs think that it is appropriate and I should enter a default judgment based upon what MeM has told me today, which is it does not intend to proceed with the trial in this case?

That's my question.

We had scheduled trial for this morning. It is now 5 after 12:00. MeM has so far succeeded, by a combination of

being late and a late application, to delay the trial. It seems to me clear that a default judgment based upon everything that MeM has said is justified.

But if the plaintiffs tell me, no, they don't want a default judgment, we can proceed, MeM will be a party, it can say nothing if it chooses, we will go forward from there.

MR. SCHWARTZ: I appreciate the question. Without wanting to cause any further delay, I agree that --

THE COURT: And I can delay the case until tomorrow while you look at all of the possibilities or I can delay the case until this afternoon while you look at all of the possibilities.

MR. SCHWARTZ: I was simply going to suggest that perhaps, not even delay, perhaps we can look at the issues over lunch and respond after lunch.

THE COURT: Okay.

Mr. Kombol.

MR. KOMBOL: Mr. Trump?

THE COURT: No, Mr. Kombol.

MR. KOMBOL: I think you elevated my stature there very slightly.

Your Honor I just want to reaffirm to the Court we are ready, willing, and able to proceed should our answer be accepted. In the absence of joinder of issue, we are unable, I am unable to see, because joinder has not been achieved -- and

I disagree affirmatively that any attempt to cobble together an answer effectuates the equivalent of an answer as is strictly required by the federal rules.

I also refer this court to its Local Rule 55.2, which under these circumstances requires that only the plaintiff may request a default, and in order to request a default the plaintiff must first secure a clerk's certificate of default, which is a predicate necessary to requesting default in the context where there is not an answer that has been offered, as we have here.

If the Court on its own initiative *sua sponte* is rejecting our answer, then absent joinder I am procedurally advising the Court that I am unable to proceed because I do not have issue joined adequate to proceed to trial.

If our answer is accepted, we will proceed in due court to trial. Under the local rules otherwise, the way I perceive them -- and I believe I am correct and I can brief this on appeal, and obviously that is where this is heading, I will have to address this on appeal -- as counsel for a party absent joinder I am unable to proceed. There is an answer on file. I have proffered I don't know why no prior answer was filed. Plaintiff was required and it was incumbent upon plaintiff to have previously sought default, because it is impossible, implausible, and illogical for a party to proceed to trial absent joinder. That is literally the procedure that

is promulgated by Local Rule 55.1 and the associated federal rules.

Having failed to do so, our answer, which has now been offered, docketed, and is on file, we believe is a fully valid and viable answer in support of trial. Upon acceptance, we are willing to proceed to trial.

Absent an answer, absent joinder, then Mr. Schwartz and his team, the plaintiffs' counsel, has a mechanism to pursue a default. First they must request a clerk's certificate of default. Then they must proceed from there.

They did not. We have filed an answer. We are here ready, willing, and able to proceed so long as joinder is acknowledged and accepted. Absent jointer, you are correct, the default is the only mechanism.

If that is how the court proceeds, despite the fact that we have know filed an answer and have offered it and we are standing on the local rules and procedures, absent joinder of issue and an answer, I agree that would be a default. If the Court wants to rule a default under these circumstances, I can't stop it. I can't change it. That's something we will appeal.

THE COURT: Okay.

Yes, Mr. Snyder.

MR. SNYDER: Very quickly. Just two points. My client asked me to put this on the record, so I will.

Number one, Mr. Sater and the Sater parties are not waiving an appeal on the record, on the joinder issue that was discussed a moment ago. So he is not waiving that.

In addition, he is not waiving the issue of the Kazakh three-year statute of limitations issue. He's preserving that.

THE COURT: Okay.

Yes?

MR. SCHWARTZ: Just a few things, Judge.

First of all, I don't think any of this is an issue as to Mr. Sater and his companies. They did answer, albeit an earlier version of the complaint. I think the case law is at least trending in the direction of saying, the better reasoned case law says that when a defendant answers a prior iteration of a complaint, unless there are substantial amendments, that controls and that's sufficient.

Any amendments to the second amended complaint were really to address MeM Energy's motion to dismiss and not Mr. Sater. I point your Honor to *KST Data v. DXC Technology*, 980 F.3d 709 (9th Cir. 2020).

As to MeM Energy, the argument that we somehow failed in our responsibilities to seek a default makes no sense.

First of all, we actually did default MeM Energy. They were in default, and they came and they moved to vacate the default. That was granted because they wanted to defend the case.

Under Local Rule 55.1, if I wanted to seek a default, I would have to file an affidavit saying that MeM Energy had "failed to plead or otherwise defend the action." They plainly have otherwise defended the action up until today. If today Mr. Kombol is announcing that MeM Energy has no intention of otherwise defending this action and they want to lay down, then a default is entirely appropriate. I can make that application, or I think that's what your Honor has said is happening. I agree with that.

The notion that MeM Energy cannot proceed to trial because issue is not joined again is at best form over substance. MeM Energy has not identified a single issue, factual or legal, that they want to present to the Court or to the jury that they are impaired from presenting.

They fully presented their claims, factual and legal, and defenses in the final pretrial order. This is nothing more than an attempt to resuscitate arguments, presumably the statute of limitation arguments, that the Court already held on Friday was waived.

That final pretrial order controls. The issue is not joinder. The issue is that they want interpose new arguments. For example, I don't think Mr. Kombol would be happy if your Honor did what you could do, which is accept their answer for filing, but still deem the joint pretrial order to control. That would allow us to go forward with all of the claims and

defenses that the parties agreed, but not with the arguments that were waived and forfeited by the parties, as the court held on Friday.

THE COURT: So no --

MR. SCHWARTZ: Anyway, I agree --

THE COURT: Hold on.

Mr. Kombol says if you just accept our answer to the second amended complaint, including the defense, they'll go forward. And you say that's fine, accept the answer, Judge, but also say the parties are bound by the joint pretrial order, and by all of the prior rulings in the case, including relating to the statute of limitations, and the claims and defenses which are set out in the joint pretrial order.

MR. SCHWARTZ: In other words, you could accept the answer but strike the affirmative defenses, and I guess I would move to strike the affirmative defenses.

THE COURT: I would strike any defenses that are inconsistent with the claims and defenses that the parties agreed to in the joint pretrial order.

MR. SCHWARTZ: Exactly. I think that's another solution here. If I could have lunch to think about it, given the time, but I think in any case, there are multiple ways to go forward.

THE COURT: All right.

What is it?

MR. KOMBOL: Your Honor, obviously if all parties reserve all rights and the ability to appeal from any determinations, which is clearly something that we would reserve, that would be something that I would be willing to accommodate.

Obviously I would disagree with the striking of any affirmative defenses and the viability of any such order, but that is something we can reserve for appeal. Otherwise that is something I am willing to consider. Perhaps when we come back from lunch we might have a resolution.

THE COURT: All right.

Be back at 1:15.

Mr. Snyder?

MR. SNYDER: Very quickly, because I haven't gotten this on the record, and I would like to. Rule 7 of the Federal Rules of Civil Procedure states at (a), only these pleadings are allowed, and then it lists complaint, answer to complaint, and so forth.

This is Rule 7. You can see it.

Notably, pretrial order is not listed as a pleading that is allowed. So to the extent that it is being interpreted as a pleading, that is, at least to my eye, potentially inconsistent with Rule 7.

I have now said that on the record, your Honor.

THE COURT: But there is a Rule 16 that applies to

joint pretrial orders. Yes?

MR. SNYDER: Yes.

THE COURT: And it succeeds Rule 7. It has provisions and it has cross-references to a sanctions rule for failure to abide by a joint pretrial order.

So you have made your point.

MR. SNYDER: Thank you, your Honor.

THE COURT: No. I have listened patiently to all of the parties. I will see you all at 1:15.

MR. SNYDER: Your Honor, would it be if we can 1:30, just given the fact --

THE COURT: Okay. 1:30.

1:30 is fine.

MR. SNYDER: Thank you, your Honor.

(Luncheon recess)

AFTERNOON SESSION

(1:30 p.m.)

THE COURT: Good afternoon.

Please be seated.

Where are we?

MR. SCHWARTZ: Judge, having looked at it over the lunch, I think that in terms of the Court's options, we are in the same place as we were before, which is either the Court can proceed by entering a default, since Mr. Kombol has made very clear that unless the Court grants him leave to file his out-of-time and waived answer, he doesn't intend to participate, and therefore given a chance to participate in these proceedings MeM Energy is declining to do so and is in default, or the Court can accept that pleading but strike any portions of it that don't conform with the later-filed pretrial order. It is clear that simply by being later in time it doesn't mean that that answer controls.

For example, putting aside the defenses, that answer denies or denies knowledge as to each and every allegation in the second amended complaint, including factual allegations as to Mr. Mochkin as a 30(b)(6) representative of MeM Energy testified about and agreed with.

For example, in the answer MeM energy denies that it is owned or controlled by Mr. Mochkin, but in his deposition he of course admitted that fact. The fact that this purported

answer is offered afterwards doesn't mean they can somehow relitigate his admissions in and control of that entity.

So the Court would certainly be within its discretion to strike from the proposed answer anything that is inconsistent with the joint pretrial order and the findings that the Court made on Friday as to waiver and forfeiture as to affirmative defenses.

If the question is what is the preference of the plaintiffs, I think the preference of the plaintiffs, given Mr. Kombol's explicit statement that MeM Energy does not intend to participate in these proceedings and will not participate in trial unless the Court accepts his pleading and it being inappropriate to accept that pleading, the default is appropriate.

As I said before, damages issues, the evidence can be put in at trial and the Court can subsequently hold an inquest based on that record.

THE COURT: And I simply wouldn't list MeM as a party for the jurors?

MR. SCHWARTZ: Correct.

THE COURT: And they would not be asked to make any findings with respect to MeM?

MR. SCHWARTZ: Correct.

MR. KOMBOL: Your Honor, if I may, the answer is on file. But I believe Mr. Schwartz is asking the Court to strike

the answer. That is what we object to. If there is an inclination of this Court to strike or not recognize the now of-record answer with affirmative defenses, we do object.

With respect to the, I guess, potshot that Mr. Schwartz just took at our answer, we respond to the allegations as set forth and as they are pled. We respond either by admitting denying or denying all information adequate to respond. That's based on the way they've phrased the allegation, and I stand by the response.

There is no challenge or question that Mendel Mochkin at one point obviously while it was an active entity was a representative owner and principal of MeM, but again we are splitting hairs here.

When it comes to the pretrial conference, Mr. Schwartz's efforts to, I guess, supersede the substance of the now of-record answer that was filed before any application for a default, which would have been the proper avenue, was made against my client.

I again dispute that. Procedurally it is improper, as everyone knows answers, and pleading can be amended up to and even during trial. More importantly, there is, based on my review, nothing in the pretrial order that in any way compromises any defense or response that we have asserted through our answer. I don't know where Mr. Schwartz derives that understanding. If I'm misreading the pretrial order, I

apologize.

But even assuming gratuitously that is correct, that still does not alter our as-of-right ability to assert defenses and affirmative defenses through an answer, which we have.

Beyond that, I maintain and retain my position that I am unable to proceed to trial without joinder on behalf of the client.

THE COURT: Okay.

Mr. Kombol filed a first answer and affirmative defenses, so it is filed. I will accept the filing except to the extent that it's inconsistent with any of the Court's prior rulings on motions to dismiss or for summary judgment against MeM and inconsistent with the joint pretrial order. The trial will be conducted in accordance with the joint pretrial order.

There are new allegations and claims in this answer and second amended complaint, including a request for arbitration, which has long since been waived. The parties can't ask for arbitration on the day of trial, having litigated the case for lo these many years.

So MeM filed this answer. As I've said, the trial will be conducted in accordance with the joint pretrial order and all of the prior rulings of the Court, including the rulings on the motions to dismiss and for summary judgment and most recently on the Court's ruling last week rejecting many of the new claims which were raised by MeM.

If MeM decides not to proceed with the trial, then there will be a default against MeM. Originally, that's what I thought MeM was doing, but then MeM said, oh, no, just take the answer and we will proceed to trial.

So it is up to MeM now to tell me, are they proceeding to trial or not proceeding to trial? That is the question.

MR. KOMBOL: Your Honor, if the answer is now accepted, we will proceed to trial. Obviously there will be some dispute over whether your prior orders in any way impact our affirmative defenses. I addressed that in my e-mail to the Court last night. I carefully reviewed every single decision in this matter. While there were arguments that were raised about statute of limitations, they do not impact the affirmative defenses that we asserted.

THE COURT: You also, by the way, filed requests to charge.

MR. KOMBOL: I did not.

THE COURT: I'm sorry?

MR. KOMBOL: I did not.

THE COURT: I mean prior counsel did.

MR. KOMBOL: I am not aware if he did. I can reread the docket. If he did, I'm happy to review it.

THE COURT: Well, you can't reject what your prior counsel did I take it.

MR. KOMBOL: Obviously, my prior counsel filed

something that is on the docket of record.

THE COURT: Okay.

MR. KOMBOL: As much as I try, I can't memorize every single filing in this action, but if there is something my prior counsel filed, it is of record.

THE COURT: The requests to charge, by the way, set out what the claims are and what the defenses are and what the jury should be charged on with respect to those claims and defenses. It would be a good idea for you to review the record.

MR. KOMBOL: Again, your Honor, even notwithstanding that, an amended pleading and an amended answer essentially wipes the slate clean to a large extent. The case law is very expansive on that. Obviously this is something we will have to brief posttrial if we get there.

But if the Court's inclination, as has been my request, is that the answer be accepted and the parties reserve all other rights and defenses based on the prior rulings of the Court, that is acceptable to my office.

THE COURT: I have told you what my ruling was. And your decision is to proceed, correct?

MR. KOMBOL: I am not aware of anything in your ruling that in any way alters the affirmative defenses that we have asserted. That is something that I believe we can brief afterwards. But I do agree that to the extent --

THE COURT: I've told you --

MR. KOMBOL: -- there was a prior ruling --

THE COURT: I have told you what my ruling is.

Your decision is to proceed?

MR. KOMBOL: With that reservation, correct, obviously, your Honor.

THE COURT: Okay. Look, I have made my ruling clear. Don't attempt, deliberately, to muddy the waters.

What I have said is your answer and affirmative defenses have been filed. If there is anything in there that's inconsistent with the joint pretrial order and the prior rulings of the Court, including rulings on motions to dismiss and summary judgment and my ruling on your numerous applications last week, all of those will prevail. Follow?

That is an easy question. Yes or no?

MR. KOMBOL: The answer is absolutely, your Honor. I agree. I have reviewed all of those rulings and I stand by my prior defenses.

THE COURT: Do plaintiffs want to say anything else?

MR. SCHWARTZ: No. Thank you, Judge.

THE COURT: Then it's time to bring up the jury.

MR. SCHWARTZ: Judge, when the jury comes up, when you introduce the trial participants, if you want, Ms. Mackenzie and Ms. Cullinan are sitting in the gallery if you wanted them to stand when you say their names.

MR. SNYDER: Your Honor, you stated your decision with respect to the recently filed answer for MeM. Does the same apply to Sater?

THE COURT: Did Sater file a new answer?

MR. SNYDER: Yes.

THE COURT: Yes. The same thing would apply to Sater. It's filed, but if there's anything in there that's inconsistent with the prior rulings on motions to dismiss, motions for summary judgment, the joint pretrial order, the parties' requests to charge, all of those will prevail.

MR. SNYDER: Thank you.

THE COURT: And if there is something that I am missing, you can bring it to my attention. Litigation is not a game and efforts to smuggle in new claims or defenses that have been waived by the failure to raise them in a timely way is unacceptable. If the parties attempt to do that, it would not be welcome.

So if your statement has some significance beyond the fact that it's said, why don't you tell me.

MR. SNYDER: Your Honor, I am afraid I am not following your question.

THE COURT: We have a joint pretrial order.

MR. SNYDER: Yes.

THE COURT: We have numerous rulings in the case. You now say: Well, we filed an answer. Does everything that you

say apply to our answer?

And the response to that is your answer was filed. It's on the record. But there is nothing in that answer that can contradict what my prior rulings have been, what the joint pretrial order is, what the parties have argued in their requests to charge.

If you're trying to smuggle in a new defense, tell me. And the plaintiffs will then have an opportunity to address that and to explain, for example, why it's been waived in a new answer filed on the day of trial.

MR. SNYDER: Right.

THE COURT: But if all you are doing is to say you have filed the answer, yes, it's been filed.

MR. SNYDER: Understood, your Honor.

MR. SCHWARTZ: At the risk of prolonging this, just to repeat something I said before, for reasons I don't understand, Mr. Snyder filed an answer only on behalf of Mr. Sater and not on behalf of his companies, Bayrock and Global Habitat Solutions.

That's fine. It is not going to affect the way that we prosecute this trial. I just want to be clear that they don't think there is any significance to that. We are not going to come into some dispute later on that those entities haven't answered.

MR. SNYDER: Both of those entities are defunct and

have no operations. However, if it causes anybody consternation that I did not include them, I'm happy to include them. It makes no difference to me.

THE COURT: You're representing them even if they're, as you put it, defunct?

MR. SNYDER: Yes.

THE COURT: All right.

Mr. Kombol would want the plaintiffs to rush to file a default against those defendants because they were not included in the answer, but the plaintiff is perfectly prepared to go to trial against those defendants.

MR. KOMBOL: Your Honor, I have no opinion on his clients and the procedure with them.

THE COURT: I was about to say before you interrupted that that required no response from you.

All right. We will wait for the jury to be brought up.

(Jury selection follows)